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Recent Cases

RECENT CASES

STAFF

ALIENS

Marino v. Immigration & Naturalization Service, 537 F.2d 686 (2d Cir. 1976)

Petitioner, an Italian citizen, applied for an adjustment of his status from that of a non-immigrant visitor to that of an alien lawfully admitted to the United States for permanent residence. The application was made pursuant to the Immigration & Naturalization Act, 8 U.S.C.A. §1101 *et seq.* At an immigration hearing, the request was denied on the grounds that petitioner had been convicted in Italy of a crime involving moral turpitude. After the Board of Immigration Appeals dismissed the petitioner's appeal, the United States Court of Appeals granted review.

An Italian magistrate had found petitioner guilty of fraudulent destruction of his own property for the purpose of obtaining insurance money. Subsequently, an Italian Appellate tribunal found the crime had been extinguished by a presidential decree of amnesty and refused, in spite of petitioner's rejection of the amnesty, to hear his appeal. Thus, the merits of petitioner's appeal from the conviction were never passed upon. The question presented to the United States Court of Appeals was whether, under these circumstances, petitioner had been convicted of a crime involving moral turpitude within the meaning of 8 U.S.C. §1182 (a) (9).

The petitioner contended that since he was deprived of his right to appeal from the decision by the presidential decree, his conviction lacked the finality necessary to render him "convicted" of a crime within the meaning of the statute.

The court viewed the finality standard required for domestic conviction of aliens in the United States as indistinguishable from the standard that should apply to foreign convictions; finality would not occur unless and until direct appellate review of a conviction had been exhausted or waived. The court further noted that deportation statutes should be construed in favor of the alien.

In light of these standards, the court concluded that petitioner's right of direct appellate review was not exhausted since the Italian amnesty decree had blocked such action. The court additionally found no waiver of direct appellate review because petitioner attempted to pursue his appeal, but was precluded from doing so. As such, the court held that petitioner's conviction did not become final so as to render him "convicted" of a crime involving moral turpitude within the meaning of 8 U.S.C. §1182 (a) (9), and ineligible for adjustment of status under 8 U.S.C. §1255. Consequently, the court vacated the denial of application and the deportation orders and remanded the case.

INTERNATIONAL MAIL ENTERING THE UNITED STATES

United States v. Ramsey, 538 F.2d 415 (D.C. Cir. 1976)

The defendants were convicted of several counts, including unlawful importation of heroin. In part, the convictions were based on evidence discovered by a New York City customs inspector during a routine, but warrantless search of suspicious looking letters entering the United States.

The defendants appealed their convictions, alleging *inter alia,* the warrantless search of the mails violated the Fourth Amendment. The Government claimed the search fell within the border search exception to the warrant requirement and noted that packages entering the country could be searched without a warrant.

The court found the border search exception inapplicable on the grounds that (1) the use of letters for carrying contraband was limited and there was less of a likelihood that a letter would contain contraband than a package and (2) there would not be any difficulty in obtaining a warrant since the authorities could detain first class mail for up to twenty-nine hours in order to investigate suspicious circumstances.

Consequently, the Court of Appeals for the District of Columbia Circuit ruled that international letters entering the United States could only be opened by customs officials after a search warrant had first been obtained. The court declared that the warrant requirement for international letters was mandated not only by the Fourth Amendment, but also by the

First Amendment. It quoted Justice Holmes, who declared "the use of the mail is almost as much a part of free speech as the right to use our tongues." The court expressed the fear that, in light of recent reports of illegal searches by members of the American Intelligence Community, continued searches would have a chilling effect on the exercise of First Amendment rights.

Finally, the court pointed out the warrant requirement would not be difficult to implement since customs inspectors could use x-ray equipment and dogs to weed out most suspicious pieces of mail and detain others until a warrant was obtained. It also suggested that post offices, which received large quantities of international mail, could have a magistrate present to make on the spot determinations of the need to open mail. The court recognized, however, that the distinction between packages, which can be opened without a warrant, and letters would have to be made on a case by case basis. The case was reversed and remanded.

Commonwealth v. Aguiar, 76 Mass. Adv. Sh. 1569, 350 N.E. 2d 436 (1976)

The defendant, George Aguiar, was convicted of knowing or intentional possession of cocaine with intent to distribute. During a routine examination of incoming foreign mail, a federal customs inspector, acting on intuition, opened a package mailed from Colombia and addressed to to "Dick Roper, c/o Agar." The search revealed cocaine. The package was repacked and delivered to its intended destination, where it was received by the defendant. Later, upon his arrest, the defendant retrieved the package from a closet and gave it to the police. He told them he had received and opened the package only so far as it was necessary to determine that it was not for him.

The defendant challenged the denial of his pretrial motion to suppress the evidence because of the initial warrantless search by customs officials, and his later consensual delivery to the police. The court rejected both contentions. It held that packages coming into the United States are subject to search without probable cause under the border search exception. (See *United States v. Ramsey, supra.* Ed.) The court also held that the question of whether the delivery was voluntary was a question of fact, and that there was ample evidence to support the findings of the lower court.

The defendant further contended that the denial of his motion for a directed verdict was improper because the evidence did not warrant a finding that he knew the package contained cocaine. The court again sustained the ruling of the trial judge and affirmed the conviction. It held that there was sufficient evidence to warrant the findings of the jury. Consequently, the conviction was affirmed.

SHIPPING CONFERENCES

Pacific Coast European Conference v. Federal Maritime Commission, 537 F.2d 333 (9th Cir. 1976)

The Pacific Coast European Conference (PCEC), a voluntary shipping cartel regulated by the Federal Maritime Commission (FMC), petitioned for relief from an FMC order concerning PCEC's "dual-rate contract." One of the primary advantages of membership in the conference is the "dual-rate contract," which gives rate discounts to shippers and exporters who agree to use only PCEC ships, and provides penalties if the shipper uses a non-PCEC carrier. In 1970, the PCEC had circulated a "Notice to All Contract Shippers" which stated that preferential rates would apply "only to shippers whose cargoes [were] tendered to Conference vessels, exclusively." 537 F.2d at 336. The "Notice" further stated that shippers would be bound to the provisions of the contract in all shipments, regardless of the shipper's terms of sale with the buyer.

The present controversy occurred in 1972, when an exporter sold a shipment of a cotton f.o.b. to a Spanish purchaser. Under the f.o.b. contract, title to the goods passed to the buyer upon sale, and the buyer had the right to choose the carrier which would transport the shipment to Spain. By the use of this contractual term, the exporter avoided any contractual obligation to the Conference. The PCEC, however, pursuant to the 1970 "Notice", claimed that the shipment constituted a material breach of the PCEC exporter contract and demanded damages. In addition, the PCEC threatened to suspend the exporter's preferential rates.

The exporter complained to the FMC who, after notice and a hearing, issued an order requiring PCEC to submit the dispute to arbitration, to cease and desist from issuing misleading "Notices" interpreting the dual-rate contract, and to refrain from suspending or threatening to suspend contract rates pending the outcome of the arbitration. The FMC retained jurisdiction of the controversy and stated that it would take further action if PCEC did not abide by the order.

The PCEC complained to the court that the FMC had overstepped its authority, had issued an illegal order, and had violated both its own procedure and that of the Administrative Procedure Act, 5 U.S.C. §§551 *et seq.* (1970). The PCEC asserted that while the FMC had the power to approve or disapprove a dual-rate contract, it had no authority to compel "specific performance" of an arbitration clause in the dual-rate contract or to issue an "interlocutory injunction." The PCEC contended, however, that under traditional contract law, it was entitled to the self-help remedies available to parties to conventional contracts, including abandonment of contractual obligations upon a material breach by the other contracting party. The FMC, while conceding that the underlying issue concerned a dispute between private parties, argued that its order was a proper exercise of its powers under §§14b and 22 of the Shipping Act, 46 U.S.C. §§813a, 821 (1970).

The court held that the FMC was authorized under the Shipping Act to take those steps necessary to "regulate the exercise of economic power by a conference which is itself a creature of the Shipping Act." 537 F.2d at 337. The FMC's order prohibiting pre-arbitration suspension of preferential rates was thus a valid interpretation of the Shipping Act. The court also ruled that the FMC's order was neither an interlocutory injunction nor a command for specific performance. Rather, the order was merely an interpretation of remedial procedures of the dual-rate contract authorized by the FMC's power to regulate conference-shipper relationships. Finally, the court held that the FMC did not violate the Administrative Procedure Act.

The petition to set aside the FMC's order was denied and dismissed.

UNITED STATES ANTIDUMPING ACT

Timken Co. v Simon, 539 F.2d 221 (D.C. Cir. 1976)

Timken Co., an American manufacturer, brought an action for injunctive and declaratory relief against the Secretary of the Treasury (Secretary) and others to require the Secretary to act in accordance with the Antidumping Act of 1921, 19 U.S.C. §160 et seq. The District Court for the District of Columbia issued an order enjoining the Secretary from refusing to impose the antidumping duties and the Secretary appealed.

Under the Antidumping Act, the Secretary, upon receiving a complaint, is to determine whether foreign goods are being sold or are likely to be sold in the United States at prices lower than their fair market value in the country of origin. Upon such a determination, the Secretary is to advise the International Trade Commission (the Commission) which then determines whether American domestic industries are likely to be injured by reason of such sales. If the Commission reaches an affirmative determination, the Secretary is required to publish such findings and impose the fees he considers necessary. An initial withholding of appraisement for customs until further order by the Secretary is designed to keep the foreign goods off the United States market until such an investigation can be made.

Timken had notified the Secretary that certain merchandise was being imported under circumstances justifying imposition of antidumping duties pursuant to the Antidumping Act. In its complaint, Timken claimed the Secretary acted without statutory authority in lifting a withholding of appraisement notice after the Commission affirmatively determined an industry in the United States was likely to be injured. Timken claimed the Secretary had no authority to lift the withholding order prior to publication of a dumping finding as provided for in the statute. The Secretary's action consequently removed the merchandise from the imposition of antidumping duties.

The Secretary claimed the court had no jurisdiction over the subject matter of the action since jurisdiction was either vested exclusively in the Customs Court by 28 U.S.C. §1582(b) or impliedly withheld from the court by virtue of its being a customs matter. Further, the Secretary maintained his action was authorized by language in the Antidumping Act to the effect that withholding notices were to remain in effect "until further order of the Secretary or until the Secretary makes public a dumping finding." 19 U.S.C. §160(b)(1)(B) (Supp. IV, 1974).

The court determined that it had jurisdiction over the subject matter since the gravamen of Timken's complaint was that the Secretary exceeded his statutory duty. It further determined that the need for or the amount of antidumping duties, both of which were within the exclusive province of the Customs Court, were not at issue. The court also found no reason to conclude that Congress impliedly withheld matters of statutory interpretation from judicial review where the statute in question dealt with customs regulation.

The court then held that the Secretary had no authority under the Antidumping Act to terminate a withholding notice prior to publication of a dumping finding after the Commission had affirmatively determined a "likelihood of injury." Consequently, the court affirmed the District Court's entry of a permanent injunction which required the Secretary to publish a dumping finding forthwith and to withhold appraisement of the merchandise until after publication.

UNITED STATES BANKRUPTCY ACT

Israel-British Bank (London) Limited v. Federal Deposit Insurance Corporation, 536 F.2d 509 (2d Cir. 1976)

Suit was successfully brought by the Federal Deposit Insurance Corporation in the United States District Court for the Southern District of New York to dismiss a voluntary bankruptcy petition filed by a foreign banking corporation. The foreign banking corporation, a British bank carrying on business in London but maintaining deposits in the United States, appealed the dismissal.

The dispute arose when two loans made to the foreign banking corporation (IBB) by two United States banks became due and were not repaid. Both United States banks, in separate actions, brought suit in federal court and obtained orders of attachment which were served on a number of banks holding IBB deposits. Concurrent to these actions in the United States courts, IBB, which was unable to pay its debts, voluntarily filed a debtor's petition with the High Court, Chancery Division, of the United Kingdom and a receiver was appointed.

Subsequently, IBB filed a voluntary petition in bankruptcy in the United States Bankruptcy Court and was adjudicated bankrupt before the United States banks could effect enforcement of their orders of attachment. The United States banks immediately filed motions to vacate the bankruptcy adjudication on the grounds the Bankruptcy Court lacked jurisdiction. The banks claimed IBB was a "banking corporation" according to §4a of the Bankruptcy Act, 11 U.S.C. §22a, which provided a banking corporation would not be entitled to the benefits of the Bankruptcy Act as a voluntary bankrupt. The Bankruptcy Court declared IBB was not a "banking corporation" within the meaning of the Bankruptcy Act and denied the motion to dismiss the voluntary petition. The District Court for the Southern District of New York reversed the decision of the Bankruptcy Court and dismissed the bankruptcy petition.

The Court of Appeals for the Second Circuit reversed the dismissal and held that IBB was not a banking corporation within the meaning of

§4a of the Bankruptcy Act. Consequently, the Bankruptcy Court had jurisdiction to entertain the voluntary petition in bankruptcy of IBB. The court applied the "normal rule of construction" that when words of exception are used in a statute, they are to be construed strictly so as to limit the exception. Given this rule, the court could find no convincing reason why IBB, the foreign banking corporation, should be denied the benefits of the Bankruptcy Act as a voluntary bankrupt when it was not licensed to do business in the United States, carried on no form of banking business, and was not regulated by either state or federal agencies.

The court noted that granting jurisdiction to the Bankruptcy Court would be consistent with the order of the High Court in England since the American trustee would bring a proceeding in avoidance of liens obtained by judgment or attachment. Thus, the United States assets of IBB would become available to all creditors on the basis of equality and the United States banks would be stopped from racing to judgment. In view of the foregoing, the dismissal of the voluntary petition by the district court was reversed.

UNITED STATES CARRIAGE OF GOODS BY SEA ACT

Wirth Ltd. v. S/S Acadia Forest, 537 F.2d 1272 (5th Cir. 1976)

A shipper, Wirth Ltd., brought an action for cargo damage against its carrier, the S/S Acadia Forest, when a Lighter Aboard Ship (LASH) barge containing the shipper's cargo collided with a canal lock and sank. The incident occurred during a unique cargo transit operation involving LASH barges. LASH barges are fully loaded with cargo at ports inaccessible to deep water vessels, towed from an inland point to the vessel which transports them to a deep water port near the destination point, and then towed to an inland point for cargo delivery. This particular LASH barge was being towed to Bremehaven, Germany for eventual loading and carriage aboard the carrier's vessel when the mishap occurred.

The carrier defended the action on the basis of §1304(2)(a) of the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §1300 *et seq.*, which relieves a "ship engaged in foreign commerce" from liability for damages resulting solely from navigational errors. The shipper claimed this defense could not inure to the carrier since the LASH barge was not a ship engaged in foreign commerce, but rather was more like a container "floating the waterways of the world. . . ." The effect of the shipper's claim, if sustained, would have been to relegate jurisdiction over the LASH barge from COGSA to general maritime law, rendering the carrier unconditionally liable. Furthermore, the shipper claimed the carrier was liable for the unseaworthiness of the stern line running from the tug to the barge which separated during low tide maneuvering, setting the barge adrift.

The District Court for the Eastern District of Louisiana held the LASH barge was not a ship engaged in foreign commerce and thus found the carrier liable for the cargo damage on the basis of the unseaworthiness of the stern line running from the tug to the barge.

The Court of Appeals for the Fifth Circuit reversed and held the LASH barge was a ship engaged in foreign commerce, notwithstanding the fact it was to be carried by a mother ship during the voyage. Consequently, the error-in-navigation defense was available to the carrier. The court based its determination upon the physical aspects of the LASH operation which it found to be "perhaps the most important link in the maritime transportation system engaging in foreign commerce." Further, it found German inaction to the intrastate portal transportation of the LASH barges determinative of the foreign character of the voyage since such transportation by foreign vessels was prohibited under German law, unless destined for a foreign port.

In view of the court's holding that the error-in-navigation defense was available to the carrier, it remanded the case to the trial court.

UNITED STATES TRADE EXPANSION ACT

Federal Energy Administration v. Algonguin S.N.G., Inc., — U.S. —, 96 S.Ct. 2295 (1976)

Respondents, several states, their governors, a congressman, and ten utility companies, brought an action against the Federal Energy Administration seeking declaratory and injunctive relief from the imposition of license fees for importation of oil and oil products. The District Court for the District of Columbia denied relief. The Court of Appeals reversed and remanded the case and the Supreme Court granted certiorari.

The conflict arose when the President of the United States directed the Federal Energy Administration to raise license fees to maximum levels not previously scheduled to be reached until several months later. The President had exercised this authority pursuant to §232(b) of the Trade Expansion

Act of 1962, as amended by §127(d) of the Trade Act of 1974, 19 U.S.C. §1862(b). The action of the President was, in effect, a direct imposition of license fees on imports.

The parties agreed that §232(b) did authorize the President to use quotas on oil related imports. The issue was whether §232(b) of the Trade Expansion Act authorized the President to control oil related imports through the imposition of license fees. Respondents claimed that presidential authority under §232(b) to adjust oil related imports was restricted to the use of quotas. They further maintained that if §232(b) was construed as granting the President authority to impose license fees, then §232(b) was an unconstitutional delegation of legislative power by Congress.

The Supreme Court held that sufficient procedures and guidelines had been provided by the Act to meet any attack of unconstitutional delegation of legislative power. The Court declared that the language of §232(b), which authorized the President "to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security," allowed the President a wide discretion in determining which method to use to adjust imports.

The Supreme Court reviewed the legislative history of §232(b) and declared Congress intended the President to use the imposition of license fees and duties to adjust imports if necessary. The Court, although it upheld the presidential authority to impose license fees, limited its decision as to the propriety of the President's action to the facts of the case. It thereby left open the question of which other methods would be available to the President to limit imports. The Supreme Court reversed the decision of the Court of Appeals and remanded the case.